Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

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REPLY OF THE STATE OF HAWAII

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REPLY OF THE STATE OF HAWAII

The State of Hawaii (the "State"), by its attorneys, hereby replies to the pleadings that were filed on October 21, 1996 in response to the petitions for reconsideration of the Commission's implementation of new Section 254(g) of the Communications Act.[1]

I. Introduction and Summary

The latest pleadings reflect interexchange carriers' (IXCs') continuing resistance to the fact that the Telecommunications Act of 1996 has both universal service objectives -- in Section 254(g) and other provisions -- and competitive objectives. Just as they did in the first phase of this proceeding, several IXCs support AT&T's request that the Commission essentially ignore Congress's dual intent by forbearing from Section 254(g)'s geographic averaging requirement wherever ill-defined "regional competition" exists. These pleas must be rejected. No carrier offers evidence to rebut the Commission's finding that such deaveraging would undermine Congress's goals by threatening subscribers in rural and high-cost areas with regionally disparate and unreasonably high rates. The Commission should also reject AT&T's and Sprint's contention that the statute can be read to allow forbearance from the rate integration

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[1] See Policy and Rules Concerning the Interstate Interexchange Marketplace/ Implementation of Section 254(g) of the Communications Act of 1934, as amended, Report and Order, CC Docket No. 96-61, FCC 96-331 (Aug. 7, 1996) (Order). References below to pleadings are to those filed in this matter on October 21, 1996.

requirement. The Commission should remain faithful to one of the statute's principal purposes -- to promote the economic and social integration of all areas of the nation -- and thus stand by its recent decision not to allow any form of rate deintegration. In addition, the Commission should not be led astray by Sprint's misreading of the rate integration requirement and of the State's petition for clarification of it.

II. IXCs Have Not Demonstrated How Regional Deaveraging Would Be Consistent with the Act

MCI, Sprint and the Telecommunications Resellers Association ("TRA") support AT&T's petition for reconsideration, parroting AT&T's claim that national carriers need greater flexibility to respond to regional competition. The State's Opposition rebuts AT&T's allegations, and the majority of those responding to AT&T's petition offer similar arguments.[2] Indeed, Pacific Telesis confirms that regional carriers will face many of the same cost issues of which AT&T complains, and it suggests that national IXCs have even greater competitive advantages than do alleged low-cost regional carriers.[3] Thus, as has been true for many years, rate averaging will continue to assure both that competition can evolve and that its benefits will inure to subscribers throughout the nation.

Given the IXCs' persistence, however, it bears reemphasizing the importance of faithfully implementing congressional intent.[4] If the Commission were persuaded to open a gaping loophole and allow deaveraging on regional basis, it would be second guessing Congress. As the State of Alaska notes in its Opposition, it is impossible to conclude in this instance "that

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[2] See Hawaii at 6; see also, Alaska at 3-7; Guam at 8-9; Northern Mariana Islands at 16-17; Rural Telephone Coalition at 2-5; USTA at 1-6.

[3] See Pacific Telesis at 2-7.

[4] See, e.g., "AT&T Requests Waiver and Consideration of Commission's Rate Averaging Rules," FCC Public Notice, DA 96-1779 (Oct. 28, 1996).

enforcement of geographic rate averaging is not in the public interest when Congress has just decided that it is."[5] Along these lines, the Commission already has properly concluded that regional deaveraging would create "a substantial risk that many subscribers in rural and high cost areas [would] be charged more than subscribers in other areas . . . [and] that widespread deaveraged rates for interexchange services could produce unreasonably high rates for some subscribers."[6]

MCI nonetheless has continued to complain that Congress created "tension" in the Telecommunications Act by requiring geographic rate averaging on the one hand and by seeking to promote maximum competition on the other. But MCI misses the point.[7] To the extent Congress created such tension (which is not clear), it did so knowingly.

Sprint and TRA more directly ask the Commission to steamroller over Congress's intent. Sprint argues that, according to antitrust standards, the competition SNET has engendered in Connecticut creates a single geographic market there.[8] Whether or not Sprint's antitrust analysis is correct, its underlying contention is that the nation should be segregated into geographic zones for rate averaging purposes. TRA similarly believes that nationwide IXCs should be allowed to depart from rate averaging wherever an incumbent LEC can compete with nationwide IXCs.[9]

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[5] Alaska at 7.

[6] Order at ¶ 39.

[7] See MCI at 4, n. 10.

[8] See Sprint at 6.

[9] See TRA at 3. Significantly, no IXC suggests a meaningful method for distinguishing between what does and does not constitute "regional competition."

Such suggestions should only give the Commission more reason to uphold its initial decision. According to TRA's logic, regional deaveraging would ensure that interexchange rates charged in areas where incumbent LECs are less competitive would be higher than rates charged elsewhere. Moreover, as competitive forces grow in some areas, driving prices towards more and more competitive levels, subscribers in areas that lack vigorous competition would face increasingly unreasonable rates. To be faithful to Congress's goals, the Commission must reject AT&T's petition "in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive . . . interexchange services at rates no higher than those paid by urban subscribers."[10]

III. The Communications Act Does Not Permit Forbearance from the Rate Integration Requirement

AT&T and Sprint take issue with the State's contention that, when read together, Sections 202(a) and 10(a) of the Communications Act do not permit forbearance from the rate integration requirement.[11] Both carriers, however, fail to address the crux of the State's argument.

The State's argument is based on a basic tenet of statutory interpretation -- where the same words are used twice in the same act they are presumed to have the same meaning.[12] The State has only noted that Section 202(a) renders it "unlawful for any common carrier to make unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or to subject any . . . locality to any undue or unreasonable prejudice or disadvantage;" and that Section 10(a)(1) prohibits forbearance where doing so would result

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[10] H.R. Rep. No. 458, 104th Cong., 2d Sess. at 132 (1996) (Conference Report).

[11] See AT&T at 14; Sprint at 8-10.

[12] See, e.g., Gustafson v. Alloyd Co., Inc., 115 S.Ct. 1061, 1067 (1995).

in "charges, practices, classifications, or regulations" that are "unjustly or unreasonably discriminatory."[13] Thus, just as Section 202(a) forbids common carriers from engaging in unreasonable discrimination, Section 10(a) forbids the Commission from forbearing from regulations necessary to prevent unreasonable discrimination. Because the Commission has long understood non-integrated rates to violate Section 202(a)'s prohibition against unreasonable discrimination, it follows that the Commission cannot forbear from the rate integration requirement.

If the Commission found otherwise, it would essentially repudiate the rate integration principle. The Commission would have to conclude that it is reasonable for a carrier to calculate rates for a particular service according to one methodology in one state and according to another methodology in another state. The State of Hawaii submits that Section 202(a)'s norm requiring like treatment of similarly situated subscribers does not permit repudiation of -- and therefore forbearance from -- rate integration. Obviously, by codifying the rate integration principle, Congress did not intend its repudiation. In fact, to the extent the legislative history is relevant, the Conference Committee was careful not to imply that the Commission could forbear from the rate integration requirement.[14] In its Order, the Commission seems to have abided by this guidance.

AT&T, in attempting to discount the State's argument, mischaracterizes it. AT&T suggests that the State would have the Commission prohibit carriers from charging

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[13] 47 U.S.C. §§ 202(a) & 10(a)(1) (emphasis added).

[14] See Conference Report at 132 ("The conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances . . . and intend that the Commission, where appropriate, could continue to authorize limited exceptions to the general geographic rate averaging policy using the authority provided under section 10") (emphasis added).

"different rates to customers in different places."[15] This is not true. The State only seeks enforcement of the principle that carriers must use the same ratemaking method for the same service. Rate integration does not dictate identical price levels for like services, only the same price setting methods.

Sprint goes so far as to distort the relationship between rate integration and geographic averaging. It wrongly suggests that rate integration is "one type of geographic averaging."[16] Again, rate integration governs ratemaking methodologies. Geographic averaging is simply one type of ratemaking methodology. The Commission has long-recognized this distinction, and Section 254(g) embodies it.[17]

Sprint also alleges that the Commission's interpretation of an inapposite and, now, abandoned version of Section 222 of the Act somehow undermines the State's position. Sprint notes that, in 1960, the Commission decided not to permit Western Union to include Hawaii in its rate schedule for domestic telegraphy services, or to assist the telegraphy carrier in obtaining congressional authority to do so. Sprint fails to mention that the Commission's decision focused on Western Union and its ability to harm competition in the provision of service to Hawaii -- not on Section 202(a)'s nondiscrimination requirements.

Former Section 222 was narrowly targeted at regulating the World War II-era merger of Western Union and Postal Telegraph, Inc. (at the time, the nation's two principal telegraph carriers). The section's specific purpose was to force Western Union (the surviving company) to divest itself of all but its "domestic" operations and thereby prevent it from

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[15] See AT&T at 3. Sprint also likens the implication of the State's position to requiring the same product to be sold everywhere at the same price. See Sprint at 12.

[16] Sprint at 8.

[17] See Order ¶¶ 6 & 47.

discriminating against the many smaller carriers that served "international" points. The statute expressly defined Hawaii as an "international" point worthy of such protection.

In 1960, the Commission held that it did not have authority to alter the statutory definition of Hawaii as an international point for purposes of Western Union's telegraphy services. The Commission also declined to seek a change in the statutory language on Western Union's behalf because, as of that date, it found (1) that Western Union still would pose a threat to competition if allowed to serve Hawaii, and (2) that Western Union had not shown how the public would benefit from an amendment to Section 222.[18]

The discreet findings, interpreting a statutory provision targeted at preventing Western Union from exploiting its market position, have no bearing on the State's view that Section 202(a) requires rate integration and that Section 10(a)(1) does not permit forbearance from it. Rate integration, of course, was implemented before former Section 222's classification of Hawaii as an international point was repealed in 1980, and the precedents cited by Sprint did not prevent implementation of rate integration. The eventual repeal of Section 222 only confirmed that Congress intended to eliminate any statutory basis for treating Hawaii differently from other states.[19]

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[18] Amendment of the Communications Act of 1934, as Amended, Relating to Telegraph Service with Hawaii, 28 F.C.C. 599, 602-616 (1960). Demonstrating Section 222's unique and narrow purpose, it defined domestic services as those among the Mainland U.S., Alaska, Canada, Mexico and St. Pierre-Miquelon. Id. at 603. When the Commission in the 1970s attempted to take a broader view of Section 222 to allow Western Union to extend a new domestic "Mailgram" service to Hawaii, the courts confirmed that the plain meaning of Section 222 could not be circumvented. Western Union Int'l, Inc. v. FCC, 544 F.2d 87 (2d. Cir.), cert. denied 434 U.S. 903 (1977). A detailed history of Section 222 can be found at Western Union Telegraph, Inc., 55 F.C.C.2d 668, 676-83 (1975).

[19] See Communications Act of 1934 -- Hawaii, Pub. L. No. 96-590, 94 Stat. 3414 (1980). If Sprint is suggesting that the Commission can forbear from rate integration simply because the Commission has not always required Hawaii to be integrated into

IV. Sprint's Objections to the State's Requests for Clarification Demonstrate the Need for Clarification

The State has asked the Commission to clarify that the rate integration requirement applies notwithstanding any forbearance from the geographic averaging requirement, and to more narrowly define its forbearance decisions. At bottom, Sprint's objections to these requests only reflect its resistance to Section 254(g)'s mandates.

A. Rate integration requires a carrier to use the same ratemaking methodology for like services wherever it provides those services

Sprint complains that clarifying the rate integration requirement as the State has requested "presumably would require AT&T or Sprint to offer the same rate plans in Hawaii or Puerto Rico as they did in Connecticut to meet competition from SNET. . ."[20]

It is not clear whether Sprint's reference to "rate plans" encompass absolute rate levels or ratemaking methodologies. If Sprint believes that carriers should be able to define ratemaking methodologies on a region-by-region basis to meet competition, it is, in essence, seeking reconsideration of the Commission's decision not to forbear from the rate integration requirement. Putting aside for the sake of argument the State's contention that forbearance is untenable, Sprint's point directly contradicts Congress's requirement that the Commission promote universal service goals like those in Section 254(g) at the same time that it promotes competition. Sprint would essentially be applying AT&T's argument (with respect to geographic averaging) to support forbearance from rate integration. The argument is subject to the same

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the domestic rate pattern, it is badly misguided. The past existence of discrimination against the State based solely on its location does not imply that those past practices (and interpretations of the Act) were appropriate. Taken to its logical end, that argument also would suggest that past, legally sanctioned racial discrimination was justified only because it once existed.

[20] Sprint at 11.

counterpoints: that Sprint's concerns should have been brought up with Congress, that regional deintegration will eviscerate Congress's policy choice to require rate integration, and that no facts have been presented to justify forbearance. Procedurally, the assertion would also be untimely. Sprint cannot now, in reply to a petition for reconsideration, seek reconsideration on a new front.

Ultimately, Sprint's ill-defined opposition demonstrates the need for the Commission to clarify that the rate integration requirement applies even where rates are deaveraged.

B. Sprint fails to demonstrate why the Commission's forbearance decisions with respect to geographic averaging should not be defined more narrowly

The State has argued that discounts in contract and optional plans derived from geographically averaged basic plans still result in geographically averaged rates and, thus, Commission forbearance in these instances is unnecessary. In response, Sprint states that the discounting process "can be very complex" and does not necessarily involve "a straight discount off of existing geographically averaged rate structures."[21] As an example, Sprint provides a tariff page that requires three across-the-board adjustments to the subscriber's charges to determine the "net charge." The example, however, proves the State's point, not Sprint's. The example's discounts are successive reductions off the "base rate." If the underlying "base rate" is geographically averaged, then the charges ultimately assessed to the subscriber will also be geographically averaged.

If in actuality Sprint is suggesting that the discounting process is more complex because carriers must "offer such discounts as are necessary to compete in the marketplace,"[22]

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[21] Id. at 15.

[22] Id. at 16.

Sprint's opposition raises even greater concerns that carriers might use the Commission's forbearance of the averaging requirement to offer geographically discriminatory discounts that effect an end run around the rate integration requirement -- as mentioned, a result the Commission should take steps to avoid.

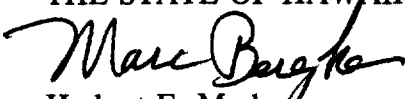
Finally, Sprint complains that the Commission would reduce customer choice if it clarifies, as the State has asked, that even non-averaged contract tariffs must be rate integrated.[23] Sprint has misconstrued the State's point. The State only submits that, where a carrier offers a non-averaged contract, similarly situated customers (regardless of their location within the carrier's service area) must have access to the ratemaking methodology set forth in the contract. Thus, if postalized rates are available on a contract basis to subscribers on the Mainland, they also must be available to subscribers in offshore points.

V. Conclusion

For the foregoing reasons, the State of Hawaii urges the Commission to not shrink from Congress's universal service goals, as enunciated in new Section 254(g) of the Communications Act, and to continue to reject efforts to eviscerate that provision.

Respectfully submitted,

THE STATE OF HAWAII



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November 5, 1996

[23] See id. at 12-14.

CERTIFICATE OF SERVICE

I, Marc Berejka, do hereby certify that on this 5th day of November, 1996, I have caused a copy of the foregoing to be served via first class United States Mail, postage pre-paid, upon the persons listed below.

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